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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JEFFREY PERROTTE, Defendant and Appellant.	E070262 (Super.Ct.No. BPR1602190) OPINION

APPEAL from the Superior Court of Riverside County. Sean Lafferty, Judge. Affirmed.

Rich Pfeiffer, under appointment by the Court of Appeal, for Defendant and Appellant Jeffrey Perrotte.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Michael Pulos and Joy Utomi, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Jeffrey Perrotte appeals from his parole revocation, contending that his resulting incarceration violates the ex post facto clause and that evidence used against him should have been suppressed as illegally obtained. We affirm.[1]

I. FACTUAL AND PROCEDURAL HISTORY

In 1993, Perrotte was convicted of second degree murder and sentenced to 15 years to life. In 2015, he was released on parole with conditions prohibiting him from possessing alcohol or traveling more than 50 miles away from his Palm Desert residence without prior approval.

In 2016, a Fountain Valley police officer was dispatched to check on a "driver possibly passed out behind the wheel" of a vehicle on a highway offramp. When he arrived, the vehicle drove off, and the officer followed the car for approximately a mile. This was not a chase, as the officer later testified that he observed no Vehicle Code

[1] In July 2019, while this appeal was pending, Perrotte filed a writ of habeas corpus in propria persona. We ordered that the petition be considered with this appeal and requested an informal letter response to the petition. In a request for an extension of time to file the informal response, the People noted that the Board of Parole Hearings (the Board) granted Perrotte parole in June 2019. We then directed the parties to file supplemental letter briefs addressing whether this appeal should be dismissed as moot. The parties agreed that the appeal was not moot because the Governor had requested en banc review of the Board's decision. (See Pen. Code, § 3041.1, subd. (a); Cal. Code Regs., tit. 15, § 2044.) The parties later informed this court that the Board, in its en banc review, referred Perrotte's matter for a rescission hearing currently scheduled for July 2020. (See Cal. Code Regs., tit. 15, § 2450 et seq.) Briefing for this appeal concluded in May 2019, but we have granted the People's motion to stay Perrotte's petition pending the Board's final decision. Because some time remains before we may consider Perrotte's petition (see Cal. Rules of Court, rule 8.385(b)(3)), we will consider the appeal now, separate from the petition.

violations during this time. When the officer activated his emergency lights and pulled the vehicle over, Perrotte, the driver, complied.

The officer pulled Perrotte over "to check his well-being." Perrotte told the officer that he had a leg cramp that prevented him from driving earlier and that he was on his way to the airport to board a flight to Nebraska. The officer ran a warrant check and discovered that Perrotte was on parole. The officer searched Perrotte's vehicle and found one small (50mL) bottle of liquor and two cans of beer, all unopened. Perrotte passed a field sobriety test and had a breathalyzer reading of "[p]oint zero." The officer observed no other signs of impairment.

Perrotte was taken into custody and charged with violating parole. According to the petition for revocation, Perrotte was 110 miles away from his residence without prior approval when he was pulled over. After an extended hearing process that included the grant of a writ of habeas corpus alleging a constitutionally deficient evidentiary hearing, the trial court revoked Perrotte's parole in March 2018.

II. ANALYSIS

Perrotte raises two contentions on appeal. First, he claims his parole revocation sentence violated the Ex Post Facto clauses of the state and federal Constitutions, arguing that the maximum length of incarceration for a parole violation is longer now than it was when he was convicted of murder in 1993. According to him, although in 1993 a parole violation could have resulted in no more than one year of incarceration, under current

law, incarceration may be indefinite. Second, he contends that the search of his car violated the Fourth Amendment.

A. *Ex Post Facto Clause*

"Article I, section 10, clause 1 of the federal Constitution and article I, section 9 of the state Constitution prohibit the passage of ex post facto laws. [Citation.] California's ex post facto law is analyzed in the same manner as the federal prohibition. [Citation.] '[T]he ex post facto clauses of the state and federal Constitutions are "aimed at laws that 'retroactively alter the definition of crimes or increase the punishment for criminal acts.'"' [Citation.]" (*People v. Alford* (2007) 42 Cal.4th 749, 755.) "[A]ny statute '"which makes more burdensome the punishment for a crime, after its commission"' violates the ex post facto prohibition of the United States Constitution [citations] and its California counterpart. [Citation.]" (*People v. King* (1993) 5 Cal.4th 59, 79.)

According to Perrotte, at the time he was convicted for murder in 1993, his maximum penalty for a parole violation was incarceration for one year. Perrotte contends that under current law, he may be incarcerated for longer. (See Pen. Code, § 3000.1, subd. (d) [for individuals sentenced to a maximum term of life for murder and whose parole has been revoked, parole review board "shall release the person within one year of the date of the [parole] revocation *unless* it determines that the circumstances and gravity of the parole violation are such that consideration of the public safety requires a more lengthy period of incarceration"], italics added.)

However, even assuming that the maximum exposure for parole violations is greater now than it was in 1993, there is no ex post facto violation. Perrotte states that law in question changed in 2013, which is after he was convicted of murder (1993) but before he violated parole (2016).[2] "Both [the California Supreme Court] and the Courts of Appeal have long held that someone who was convicted and sentenced for one crime, and who commits a new crime or other misconduct while either on conditional release or in custody for the original conviction, is subject to new penalties and adverse procedural laws enacted between the time of the two acts. . . . [T]hese cases reason that the new law merely alters the legal consequences of new misconduct (as opposed to prior crimes), and that it therefore has prospective (as opposed to retroactive) effect." (*John L. v. Superior Court* (2004) 33 Cal.4th 158, 174, fns. omitted (*John L.*).) Because the laws regarding parole violations changed in 2013 (i.e., between the time of his initial offense and later misconduct), Perrotte is permissibly subject to those laws as amended.

Importantly, the United States Supreme Court has arguably suggested otherwise. In *Johnson v. United States*, (2000) 529 U.S. 694, the court noted that "postrevocation penalties relate to the original offense" such that a post*conviction* increase in those penalties may run afoul of the ex post facto clause. (*Id.* at p. 701.) The statement is

[2] In his argument section of his opening brief, Perrotte relies only on Penal Code section 3000.1, which he contends became effective in 2013. In his reply brief, Perrotte asserts that the relevant change in law is Penal Code section 3057, which he contends became effective in 2011. Perrotte refers to Penal Code section 3057 in his opening brief, but only in reciting the procedural history of the case. Regardless of which of the two changes in law is the proper focus of analysis, the result under the Ex Post Facto clause remains the same.

dictum, however, because the court then determined that "the ex post facto question [did] not arise" in the case before it. (*Id.* at p. 702, italics omitted; see also *id.* at p. 696 ["we find that consideration of the Ex Post Facto clause is unnecessary"], italics omitted.) Our Supreme Court made much the same point in *John L.* when it stated that the ex post facto analysis in *Johnson* "is not binding" given that "[s]uch language had no bearing on *Johnson*'s statutory holding or rationale." (*John L.*, *supra*, 33 Cal.4th at p. 176.)

People v. Callejas (2000) 85 Cal.App.4th 667, which Perrotte relies on, does not change this result. In *Callejas*, the Court of Appeal saw "no principled way of distinguishing *Johnson*" and held that "imposing a parole revocation fine on a parolee who committed the underlying offense before the fine was enacted" violated the ex post facto clause. (*Id.* at pp. 678, 669.) *Callejas* did not recognize, however, as *John L.* later did, that *Johnson*'s ex post facto analysis was dictum. (See *John L.*, *supra*, 33 Cal.4th at p. 177.)

Here, Perrotte committed "new. . . misconduct while . . . on conditional release," so he is "subject to new penalties . . . enacted between" the murder and the parole violations. (*John L.*, *supra*, 33 Cal.4th at p. 174.) Accordingly, his Ex Post Facto challenge fails.

B. *Fourth Amendment*

Perrotte contends that the search of his vehicle violated the Fourth Amendment because the officer had no reasonable suspicion that Perrotte violated any law before

pulling him over. Because that stop led to the search, Perrotte contends that any evidence obtained from the search must be excluded.

"""'Under the Fourth Amendment, government officials may conduct an investigatory stop of a vehicle only if they possess 'reasonable suspicion: a particularized and objective basis for suspecting the particular person stopped of criminal activity.' . . . Such reasonable suspicion 'requires specific, articulable facts which, together with objective and reasonable inferences, form a basis for suspecting that a particular person is engaged in criminal conduct.'"' [Citation.] 'Under this standard, an officer may stop and briefly detain a suspect for questioning for a limited investigation even if the circumstances fall short of probable cause to arrest.' [Citation.] . . . At the same time, however, 'no stop or detention is permissible when the circumstances are not reasonably "consistent with criminal activity" and the investigation is therefore based on mere curiosity, rumor, or hunch.' [Citation.]" (*Arburn v. Department of Motor Vehicles* (2007) 151 Cal.App.4th 1480, 1484.) Moreover, "[a] warrantless search is unreasonable under the Fourth Amendment unless it is conducted pursuant to one of the few narrowly drawn exceptions to the constitutional requirement of a warrant." (*People v. Schmitz* (2012) 55 Cal.4th 909, 916.)

Perrotte's argument that the officer lacked reasonable suspicion has at least some initial appeal: the officer testified that he did not observe Perrotte commit any Vehicle Code violations and that Perrotte was pulled over only so that the officer could check on Perrotte's well-being. Moreover, although the People's appellate brief argues that the

stop and resulting search was valid under the "community caretaker exception" as articulated in *People v. Ray* (1999) 21 Cal.4th 464, in *People v. Ovieda* (2019) 7 Cal.5th 1034, decided after the briefing in this case was completed, our Supreme Court disapproved *Ray* and held that the community caretaker exception applies, to the narrow extent it applies at all, only "in the context of vehicle impound procedures." (*Id.* at pp. 1038, 1053.)

Dispositive here, however, is the fact that we are reviewing a parole revocation, not a criminal trial. In *Pennsylvania Bd. of Probation and Parole v. Scott* (1998) 524 U.S. 357, the United States Supreme Court held that the exclusionary rule, which "generally prohibits the introduction at criminal trial of evidence obtained in violation of a defendant's Fourth Amendment rights," does not apply in parole revocation hearings. (*Id.* at p. 359.) And although the California Constitution, like the Fourth Amendment, prohibits unreasonable searches and seizures (Cal. Const., art. I, § 13), "state and federal claims relating to exclusion of evidence on grounds of unreasonable search and seizure are measured by the same standard" (*People v. Camacho* (2000) 23 Cal.4th 824, 830).[3]

Thus, whether the officer had reasonable suspicion to pull Perrotte over does not affect whether the trial court should have considered evidence obtained after any purported violation. Perrotte fails to articulate a basis for overturning his parole revocation on this ground.

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[3] *People v. Sanders* (2003) 31 Cal.4th 318, which Perrotte relies on, is inapposite. There, our Supreme Court held that evidence seized during a parole search must be suppressed in a criminal trial. (*Id.* at pp. 322-324.)

III. DISPOSITION

The judgment is affirmed.

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RAPHAEL
J.

We concur:

CODRINGTON
Acting P. J.

SLOUGH
J.